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No. 10-158

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT C. HUNTZINGER, SPECIALIST,
United States Army, *Petitioner*,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Armed Forces

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The Government asserts in its brief in opposition, "[O]nce the computer was seized, [CPT Miller] reasonably examined it for the presence of child pornography as part of his legitimate command responsibilities." (Opp'n at 10.) This statement is the heart of the matter at issue in this case. While the Government's assertion is an accurate reflection of the lower court's opinion, in petitioner's view it constitutes a dispositive concession, for there is no existing legal precedent supporting the notion that military commanders may conduct searches for criminal evidence without regard to the Fourth Amendment. On the contrary, such an assertion is in contravention to this Court's prior precedent as well as that of the Court of Appeals for the Armed Forces (CAAF). This case merits review because such a broad and expansive view of military authority violates the Constitutional rights of U.S. servicemembers serving their Nation in a time of war. Such an expansive view of military authority also calls into question the subordination of those military authorities to civilian control.

Put simply, it is impossible to reconcile Captain Miller's search of petitioner's computer equipment with the Fourth Amendment. No contraband had been discovered in regards to petitioner until CPT Miller personally searched petitioner's computer equipment. Until he searched the equipment, all CPT Miller had before him was a nondescript password-protected laptop computer and a

nondescript external hard drive. This case is akin to a situation in which a presumably neutral and detached magistrate orders the seizure of a purse suspected to contain contraband, but upon receipt of the purse the magistrate personally opens the purse and searches the purse's contents for contraband. Case law is plain: a search for computer files is an illegal search unless properly authorized pursuant to the Fourth Amendment, even within the military. *U.S. v. Conklin*, 63 M.J. 333 (C.A.A.F. 2006) (Airmen living in barracks room had a reasonable expectation of privacy in digital files within their personal computers).

The Government seeks to avoid review by characterizing the lower court's opinion as fact bound, but that is incorrect. There are no facts in this case that would operate to limit the expansive assertion that a military commander may personally conduct a search for criminal evidence without any further authorization whatsoever, based solely on unspecified command responsibilities. The lower court did not state what those responsibilities were, how far they extend, or when they apply. Nor did the lower court pause to explain how any such responsibilities absolve the military commander from complying with the Fourth Amendment. In short, there are no facts present here to limit the reach or applicability of the lower court's opinion. This is particularly troubling since CAAF is the military's highest court. CAAF"s opinion also contains no limitation that would preclude legitimate command responsibilities from superseding other

Constitutional protections beyond search and seizure.

Once one recognizes CPT Miller's actions as an illegal search, the house of cards that is this military court-martial becomes apparent. The implications of the illegal search are plain and obvious: CPT Miller was performing law enforcement functions and never intended to perform duties as a neutral and detached magistrate. His personal search was entirely unlawful. In fact, there is no support in the record for the opposite conclusion. Captain Miller never testified that he intended to authorize a probable cause search, nor did he state that he even knew what the requirements were for a probable cause search. No other authority for a probable cause search is present in this case. The only way the military courts have thus far reached the conclusion in this case that CPT Miller was neutral and detached is by ignoring the illegal search and presuming neutrality. This is also the problem with the Government's attempt to distinguish *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). (Opp'n at 10.) Here, Captain Miller did not merely make himself available to law enforcement officers; he *was* the law enforcement officer. Likewise, Captain Miller was not merely present at the scene of a search; he personally conducted the search. It is hard to fathom how CPT Miller was not personally and actively involved in gathering evidence, when in fact he was the one who searched petitioner's computer equipment for contraband.

Captain Miller's conduct immediately following petitioner's invocation of rights and request for counsel further belies any notion that CPT Miller was ever neutral and detached; CPT Miller responded to petitioner's invocation of rights by ordering petitioner to provide the password to his laptop and then proceeded to search the laptop in front of petitioner.

In some areas, command authority might be quite broad, and it is undoubtedly true that some Constitutional requirements apply differently in the military context. But the claim made in this case is unprecedented and unwarranted. The soldiers, sailors, airmen, and marines of this free country are sworn to uphold and defend, with their very lives if necessary, the Constitution of these United States. There is no basis for a military officer to ignore and outright violate one of the most fundamental protections of our Constitution.

The Government concludes by stating that further review is not merited due to a lack of conflict with *Lo-Ji Sales* or any other decision of this Court. Petitioner disagrees. On the contrary, the lower court's opinion is in conflict with every single opinion of this Court in this subject area.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant his petition.

Respectfully submitted,

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